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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAOL REXMARK UNION STATION,
LLC, *et al*,

Plaintiffs,

v.

22 Civ. 6649 (GHW)

UNION STATION SOLE MEMBER,
LLC,

Defendant.

Conference

New York, N.Y.
April 7, 2023
3:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

MORRISON COHEN, LLP
Attorneys for Plaintiffs
BY: RICHARD S. HONG
AMBER R. WILL
MAHNOOR MISBAH

KASOWITZ, BENSON, TORRES, LLP
Attorneys for Defendants Union Station Sole Member, LLC
BY: DAVID E. ROSS
ANDREW W. BRELAND

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1 THE COURT: At the outset, I'd like to take the
2 appearance from the parties. I'd like to begin with plaintiff.
3 What I'd like to do is ask the principal spokesperson for each
4 side of the case to identify him or herself and the members of
5 their team rather than have each lawyer introduce themselves
6 individually.

7 Let me start first with counsel for plaintiff. Who's
8 on the line for plaintiffs.

9 MR. HONG: Good afternoon, your Honor. Richard Hong,
10 H-O-N-G for the plaintiffs. With me are Amber Will, *WILL* and
11 Mahnoor, M-A-H-O-N-O-O-R, last name M-I-S-B-A-H.

12
13 THE COURT: Thank you. Good. Thank you. So let me
14 hear who's on the line for defendant.

15 MR. ROSS: Good afternoon, your Honor. David Ross
16 from Kasowitz Benson for Union Station Sole Member, and with me
17 is my colleague Andrew Breland.

18 THE COURT: Let me start with a few brief comments
19 about the rules I'd like the parties to follow during today's
20 proceeding. At the outset, please remember that this is a
21 public proceeding. Any member of the public or press is
22 welcome to dial into this conference. I'm not presently
23 monitoring who has dialed in, so I ask you all just to keep the
24 possibility that third parties are auditing the call.

25 Second, please keep your phones on mute at all times

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1 except when you're intentionally speaking to me or to the
2 representatives of a party as a participant in the conference.
3 Next, please state your name each time that you speak during
4 the conference. I will not be doing that, but I ask that each
5 of the other participants please state their name each time
6 that they speak. Fourth, please abide by instructions by our
7 court reporter that are designed to her help do her job. And
8 finally I'm ordering that there be no recording or rebroadcast
9 of all or any portion of today's conference.

10 Counsel, with that out of the way, let's turn to the
11 substance of today's proceeding. I scheduled this conference
12 in order to take up the issues raised in the letter submitted
13 to me at Dkt No. 90. Let me hear from each of you about the
14 issues presented. I should say I read the letter submitted by
15 the parties. I have some questions about the nature of the
16 issues that are presented to me for resolution here. We'll
17 also need to talk about the extent to which the parties wish to
18 submit briefing regarding these issues. And I'm going to
19 expressly ask if that is indeed the request, it will change the
20 focus of today's conference if this should be considered by the
21 Court as really a premotion conference other than an
22 opportunity to engage in a conversation geared toward
23 resolution of the issues.

24 If that's the case, please feel free to let me know.
25 I'm happy to refocus the conversation to the extent that this

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1 is an issue that the parties wish to present formal briefing
2 on. I will surely give you the opportunity to do that, and
3 we'll focus much more heavily here on scheduling issues rather
4 than a deeper conversation about the nature of the disputed
5 issues, which we would take up in more depth after I've
6 reviewed the briefing. So let me start, if I can, with counsel
7 for defendant.

8 Counsel, first off, how should I conceive of the
9 letter here? Is the request here that I grant leave to you to
10 file a motion or more comprehensive briefing with respect to
11 these issues? Again, I'm happy to do that, and I will focus on
12 asking some targeted questions here that will hopefully inform
13 the briefing, but we'll spend a little bit less time during the
14 course of the conversation here today perhaps debating the
15 substance of the questions presented. So counsel for
16 defendants, let me ask that threshold question first and then
17 we'll turn to a discussion of the nature of the disputed
18 issues. Counsel.

19 MR. ROSS: Yes, David Ross once again for defendant.
20 It was not our intention to have to fully brief the discovery
21 issues that are presented by the letters that are now -- the
22 letter that is now before you unless your Honor feels after
23 hearing the parties that full briefing would be necessary. We
24 were hoping that by the end of this conference your Honor would
25 issue a ruling, or at least guidance sufficient to resolve the

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1 parties' dispute so that we don't have to formally brief it and
2 either put the Court to the task of deciding the motion or the
3 parties to the task of delaying the case. Part of the
4 frustration that we have on the defense side is that we have a
5 deadline coming up. We need the documents to take the
6 depositions. Let me think. Let me see if I can just try to
7 summarize beyond what's in the letter for the Court what I
8 think is the nub of it.

9 Your Honor, we think that the issues that are
10 presented on this application or in this letter submission are
11 very straightforward and a kind of standard discovery 101 if
12 you will that parties engage in all the time. What we had, is
13 we served document requests. We got protests from the
14 plaintiff that they were excessive in number or scope. Without
15 waiving any rights or agreeing to give up anything, we made a
16 good faith attempt repeatedly over numerous discussions to try
17 to limit the requests in number and scope, and to reach
18 agreement on ESI or electronic search terms that would assist
19 in trying to identify responsive documents. At no point in
20 time did we waive the right to actually seek the paper
21 documents or the electronic documents that are called for by
22 the requests.

23 Your Honor may recall that there came a time that the
24 plaintiffs moved for summary judgment. And in response to
25 that, we filed a Rule 56(d) statement that laid out the reasons

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1 why we could not fully respond, and the subject matters on
2 which we would seek discovery before being able to respond
3 fully and prepare the case for decision by summary judgment or
4 trial. Your Honor agreed with us and denied the summary
5 judgment motion. And in that decision your Honor said that the
6 topics that we were seeking discovery on could give rise to a
7 defense to the claims or otherwise undermine the claims of the
8 plaintiff. And as a result, discovery should proceed.

9 So we have sought discovery. And as a result of the
10 search protocols and the discussions we've had with plaintiffs'
11 counsel, they performed searches that came up with a total of
12 approximately 8,000 documents. Now for the proportionality
13 issue, your Honor, remember that this case potentially involves
14 hundreds of millions of dollars as to what is at stake. And
15 what we think plaintiffs are seeking a windfall through the
16 declaratory judgment that they're seeking. And they think
17 they're simply seeking to enforce their rights whether it's a
18 windfall or not. In any event, a large amount of money is
19 involved. I don't think anybody disputes that.

20 Second, 8,000 documents is not extremely large, but
21 after applying the search terms and plaintiffs ended up
22 producing something like 400 documents to us. The production
23 was not only paltry in number, but did not produce documents on
24 a number of topics or failed to produce documents that we had
25 from other sources, which we think would have been responsive

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1 to the search terms that we asked be searched. So we came back
2 to them and said, we have four additional requests, or we're
3 relying on four of the original -- some of the original
4 requests. And we would like to see all responsive documents
5 that you have from those. However, we're not going to put you
6 to the burden, as one would at the start of a case, of
7 searching every file cabinet or every electronic source. We
8 said you can use the 8,000 hits that you got as the total pool
9 to search from to determine what documents you have about, for
10 example, communications on Union Station and Cushman and
11 Wakefield, very specifically defined names and terms.

12 And the other side has said, no. We're not doing
13 that. That's beyond what we originally agreed to do in the way
14 of search terms and a search protocol. And, your Honor, right
15 before this phone call it occurred to us that it seems like
16 such an obvious proposition that what one agrees to from the
17 point of view of a search protocol is merely a tool to try to
18 identify documents that may be responsive. But a party retains
19 its obligation to conduct a reasonable search for responsive
20 documents. And I thought it was so obvious, it took about ten
21 seconds to find a decision in the Southern District of New York
22 in a case called *The Raine Group v. Reign Capital, LLC*, a
23 decision from Judge Katherine Parker, magistrate judge, from
24 2022. And, your Honor, I can give you -- everyone the Westlaw
25 cite. It's 2022 WL 538336 at *1 (S.D.N.Y. February 22, 2022).

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1 And in that short decision Judge Parker says on this
2 issue about ESI "In sum, an ESI protocol and search terms work
3 in tandem with the parties' obligations under the federal rules
4 and do not replace a parties' independent obligation to produce
5 electronic or paper documents that are reasonably accessible,
6 relevant, and responsive within the meaning of Rule 34."

7 Your Honor, on the four topics that we're seeking
8 documents, they go directly, as I said, to the issues from the
9 Rule 56(d) opposition. That they relate to, for example, the
10 negotiation and drafting of the loan documents that are going
11 to be the subject of further briefing to you and potentially
12 trial. They go to the affirmative defenses that we asserted
13 with respect to communications that were had with perspective
14 tenants at Union Station, which may have been tortiously
15 interfering with our clients rights or their ability to realize
16 income with respect to the loans in question. Same thing with
17 the Cushman and Wakefield item where we believe that Cushman
18 and Wakefield was interposed by the plaintiffs to communicate
19 with tenants, and we'll find out what documents among the 8,000
20 that are responsive.

21 And likewise documents that relate to communications
22 with the equity lender and which relate too directly to our
23 defense, that there were improprieties in interfering with our
24 attempt to get equity infusion and be able to pay down the
25 mezzanine loan, among other things. So in sum, we have

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1 requests for relevant documents that are measured in number,
2 that are reasonable in terms of the burden since we're agreeing
3 that the plaintiffs don't have to go back and reinvent the
4 wheel if you will and can use the 8,000 they have already -- I
5 omitted to say that the plaintiff have told us that they
6 already reviewed the entire group of 8,000. So they had been
7 through them previously.

8 And, your Honor, we need the discovery in order to get
9 on with the depositions and finish this case so it can be
10 presented to you through future motions. That's it for now,
11 your Honor. I'll reserve sometime to come back and reply if
12 appropriate.

13 THE COURT: Thank you. Just briefly a couple of quick
14 questions for you before I turn to counsel for plaintiff.
15 First, the plaintiffs argue in their letter that these four new
16 topics are more expansive than the original written request.
17 So let me ask everybody to keep their phones on mute. Somebody
18 just joined and they are not on mute. Thank you. So please
19 keep yourselves on mute at all times if you would. Good.
20 Thank you very much.

21 So, first they argue that the scope of these requests
22 is broader than the original request. They make a couple of
23 arguments based on that. First is that it would require them
24 to rerun the searches. I understand you would argue that
25 that's not true because you're agreeing to a limit this process

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1 to review of the 8,000 documents or so that were originally
2 pulled, so I'll put that aside. The other principal difference
3 between the written request and these requests is the word
4 "concerning" which is of concern to them and potentially to the
5 Court because they're arguably broader in scope than the
6 underlying written request, and maybe more challenging, may
7 make it more challenging to identify responsive documents than
8 the request as previously formulated.

9 So can I ask you, counsel, to comment on whether the
10 request that we've talking about today are broader than those
11 that were contained in the original written request. And in
12 particular, can you comment on the argument that the language
13 of these new request which talk about documents that concern
14 certain subjects or entities is substantially broader and more
15 difficult therefore for them to identify the universal
16 responsive documents. Go ahead counsel for defendant.

17 MR. ROSS: Yes, your Honor, David Ross. Number one,
18 the previous -- the requests are not more expansive than the
19 original request that we served and that eventually led to
20 discussions in an effort to see if we could narrow them and
21 find common ground. But if the question is were the original
22 requests -- are these broader than the original requests, the
23 answer is no.

24 As to your second question about the use of the word
25 "concerning." Certain of the requests said, Give us your

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1 communications with a certain party. And in some of these we
2 are saying, concerning which. In other words, might be a
3 discoverable document about a communication between plaintiff
4 and Cushman and Wakefield. So to a certain extent, yes, your
5 Honor, I think some of them could be said to be broader in
6 terms of the use of the word "concerning." Though, frankly,
7 every case I've ever worked on involving Rule 34 requests
8 typically includes either the words "concerning" or "referring"
9 or "relating to."

10 And those I don't think have ever been determined to
11 be offensively overbroad in the ordinary context in which they
12 are used. So in one case if I wrote to you, your Honor, that
13 would be a communication with you. If I also had a document in
14 which I said to Mr. Breland my colleague yesterday, I wrote to
15 Judge Woods about the following matter -- and assuming it
16 wasn't privileged -- that would also be responsive as it's
17 certainly discoverable and could lead to discoverable
18 information. It's also not overbroad in the sense of -- if the
19 issue is, what were the communications about between you and
20 me, Judge, in my hypothetical. So I don't think there's
21 anything offensive, unusual or troubling about it, or that puts
22 anybody through an extraordinary burden that they don't have in
23 every other case.

24 THE COURT: Good. Thank you. Let me turn back to
25 counsel for plaintiff. Counsel, what's your view.

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1 MR. HONG: This is Richard Hong on behalf of the
2 plaintiffs. I neglected to mention that for the plaintiff,
3 we're from Morrison Cohen. I'm relatively new to the firm, so I
4 think I should mention my firm. My apologies.

5 Your Honor, we are here because the defendants are
6 making unreasonable discovery requests. Let me first address
7 the two questions that you posed to Mr. Ross, and then I will
8 get into a little more detail if you would allow me to sort of
9 provide some context of why we are here and why the Court
10 should not allow this discovery. To your questions about
11 whether the new request are broader, it is most definitely
12 broader. And then is it more expansive, that's an affirmative
13 answer as well. It is more expansive. Despite whatever
14 Mr. Ross says, if you read the language of the new request and
15 compare it, as we have done in our letter, it is crystal clear
16 that they are asking for broader request.

17 Now, why is that important. Well, it's important
18 because we're going to have to redo the document review, and
19 we're going to re-spend time, and the burden is unreasonable to
20 do that at this juncture. And I'm going to go into the burden
21 issue because there is substantial burden issue. But before I
22 do that, let me just briefly go over a couple of things that
23 Mr. Ross did not mention.

24 Number one, we are here because your Honor advise
25 us -- we're here in part because your Honor advised us on

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1 December 1 that the parties should confer about the overbroad
2 discovery request that the defense made. And what we did was
3 taking your guidance, the parties met and they met and
4 conferred. And from that process which is detailed in the
5 letter, we came up with 100 search terms to search. We did
6 expansive searches per defendant's request. They're not our
7 search terms. We used their terms. And from that we got 8,000
8 documents.

9 Now those 8,000 documents arose because quite frankly
10 some of the search terms were overbroad, so it picked up a lot
11 of documents that it really shouldn't have picked up. But the
12 reality is, those were the defendants search terms, so we used
13 them.

14 And when we picked up 8,000, we now have to look for
15 whether or not it was actually responsive to the document
16 request that had been agreed upon. And from there, we called a
17 smaller number, I think the number is close to 488 or 489
18 documents that we have pulled together and we sent them to the
19 defense. Now clearly the defense is unhappy with those
20 collections so they want a second bite at this juncture to ask
21 for another production.

22 The problem is that we followed the defendant's
23 request. We pulled the documents that were responsive, and we
24 withheld the privileged documents. I don't know if any
25 additional effort will quite frankly be meaningful. And in

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1 this case I would like to remind the Court that Mr. Ross
2 mentioned in prior conference that he was looking for limited
3 discovery. And now it appears the broader terms that he's
4 using, he's asked for more discovery that will clearly come
5 against the discovery deadlines that we have and that it will
6 pose more burden to the plaintiffs.

7 Now, I want to talk a little bit more about what the
8 burdens are. We sort of figured out how much time and effort
9 this will take for 8,000 documents. I wasn't sure how long it
10 was going to take, your Honor. So I asked around, and we did
11 some checking around and we did what we did in our prior
12 production. It appears it would take about two weeks of
13 associates working on this, and it will cost in excess over
14 \$100,000 to do further review. This is not -- contrary to what
15 Mr. Ross said, this is not taking the 8,000 documents and then
16 they're just looking it over again.

17 No, we have to look at the new broader request and to
18 see if they're responsive to it or not. In other words, the
19 associates who are familiar with this case, familiar with the
20 issues need to look at each document again *de novo*. That is a
21 substantial burden under the circumstances of this case, and it
22 is not proportional to what is necessary.

23 Now we have tried, quite frankly, tried to work this
24 out contrary to the position that Mr. Ross is taking. We have
25 been trying to work with them to see whether or not there is a

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1 possibility of doing something else. Quite frankly, they have
2 taken the position that broader is better. And they can't
3 agree to a broader is better when it's just not going to work.
4 When we look at this issue, we agreed. One thing that I agree
5 with Mr. Ross, it is a fundamental discovery dispute, but we
6 see the world very differently. We see the world very
7 differently because we made a lot of effort to make sure that
8 we found and produced responsive documents. And on the other
9 hand, they come back and ask us to do more on things that would
10 likely not reveal much and would be a substantial burden on us.

11 Now I know that Mr. Ross mentioned about looking at
12 all kinds of loan documents and things of that nature, and I
13 understand about his affirmative defenses. But I do want to
14 bring the Court back to what's really at issue from our
15 perspective which is the mezzanine loan agreements. The
16 specific provision of 5.2.2 provision on it, and that's really
17 the operative issue that will ultimately be what will be
18 briefed by the parties. So to us when the defendants are
19 asking for all this overbroad discovery, it just seems -- it
20 really feels like a fishing expedition than not. So for all
21 those reasons, we respectfully request that the defendants be
22 denied of this additional unnecessary, unreasonable discovery.

23 THE COURT: Counsel, let me ask briefly about your
24 estimates regarding the burden associated with these
25 incremental request. First off, is that estimate based on

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1 counsel for defendants premise namely that any search need only
2 be conducted against the 8,000 odd documents that were
3 originally pulled or does that estimate assume that a new
4 search would need to be conducted?

5 MR. HONG: It's the former. We did not assume that we
6 will do additional searches. We took defendant's premise, and
7 I asked the associates how long it took, what time, what
8 effort, since the associates were working on this case are
9 familiar with this case, and it would be cost effected to have
10 the associates do it again. And we estimated that -- we take a
11 certain number of hours, even at a very quick pace, and
12 obviously their billing rates; and when we consider all these,
13 essentially two weeks of work, it's well over \$100,000.

14 THE COURT: Thank you. Second related question goes
15 to what the scope of the review would be you, which I assume
16 would be connected in part to the scope of the prior review.
17 Does it make a difference in terms of the burden or how much of
18 the difference does it make in terms of the burden associated
19 with the requested incremental review if the new document
20 request are limited to the scope of those request that were
21 previously made; so if the request were limited to the original
22 request as opposed to what you argued to be their more
23 expansive supplemental request using the word "concerning."
24 Counsel for plaintiff, what's your thought?

25 MR. HONG: I'm not sure. I guess I'm not clear on

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1 exactly what the defense would want us to do if we are using
2 the old terms and old not the broader language on it. We have
3 as we mentioned approximately 8,000 documents that were pulled,
4 but I don't know exactly what they want us to do with those
5 things that have been already reviewed on that. In either
6 event, your Honor, in all candor, I think that we're going to
7 have to review it again even with the limited scope. Now it
8 may take a little less time perhaps, but it's still going to
9 take a substantial amount of effort. I think there's -- I
10 understand this is a large case. I understand that, but
11 there's got to be sensibly patience here particularly when the
12 defense agreed at the outset in December that it was going to
13 be limited discovery.

14 THE COURT: Thank you. Understood. Another question
15 that goes to burden. One of the supplemental areas of inquiry
16 that the defendants are the seeking is something that I'd call
17 analogous to their request five which is documents and
18 communications concerning the drafting and negotiation of the
19 loan document. I understand your contention is that the only
20 loan documents that are at issue in this litigation are the
21 loan documents consisting of the mezzanine loan documents.
22 What's the incremental burden associated with this request were
23 it to be limited to -- I'm going to begin with by asking the
24 mezzanine loan documents.

25 MR. HONG: One moment, your Honor.

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1 THE COURT: Thank you.

2 (Pause)

3 MR. HONG: Based on what I'm advised, I think there's
4 really not that much a difference because we only produced
5 documents relating to the drafting history of Section 5.2.2.
6 So the burden for us would be expanded if we were to look at
7 the entire loan agreement. I appreciate, your Honor, that you
8 may be looking at potential ways of limiting the burden. But
9 given where we are, I'm not sure there's a way to limit the
10 burden on us.

11 THE COURT: Thank you. Understood. I'll move on
12 taking that not as an invitation to decide this as an all or
13 nothing decision. Let me turn to counsel for defendant on
14 this. I understand there's a production with respect to the
15 loan documents according to counsel for plaintiff to date has
16 been limited to information regarding the negotiation of
17 Section 5.2.2. Of course my understanding is that any discovery
18 related to the negotiation of the documents would be germane to
19 this litigation only to the extent that the Court might
20 ultimately find some provision of the loan agreements to be
21 ambiguous, some portion that I have not had the opportunity to
22 consider.

23 First let me just check that premise. And then
24 second, I'm going to ask, are there other provisions of the
25 loan documents, counsel, that you expect to argue are

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1 ambiguous.

2 MR. ROSS: Your Honor, David Ross. I think -- let me
3 see if I can answer it this way, and let me know if you need
4 more. First of all, the production related to Section 5.2.2
5 was something like three pages. It was extremely limited,
6 although the lawyers that drafted the documents and delivered
7 1200 documents or something on that order to plaintiff, their
8 clients, which they said were responsive to the subpoena that
9 we served on them. We have gotten just three pages or three
10 emails, something tiny, number one.

11 Number two, in addition to Section 5.2.2 of the loan
12 agreement, plaintiff themselves identified sections eight, nine
13 and thirteen of the pledge agreement in their pleading, in
14 their complaint, and Section 10.4 of the loan agreement in
15 their claims. In addition to that, there are questions as to
16 what the source of the provisions were in the loan agreement
17 and who drafted them and whether they came from the mortgage
18 loan documents and were copied into the mezzanine loan
19 documents or not. So the reason why we're seeking this
20 discovery -- and again, we're talking about this limited
21 universe of documents -- it is because the question about where
22 the provisions came from, and also because there are questions
23 of construction. I mean, the plaintiffs have argued that your
24 Honor has to look at the entire document in order to determine
25 the context of the provisions, not just 5.2.2, but other parts

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1 of the document including the remedy sections.

2 So we think we're entitled to discovery on issues that
3 plaintiff has put in issue, number one. With respect to -- I
4 have comments that I'd like to make briefly, your Honor, about
5 this burden amount and how much it will cost. I want to first
6 answer your question directly, so I'm going to stop at this
7 point on that subject.

8 THE COURT: Good. Thank you very much. Very good,
9 counsel. I'll turn back to you and give you the opportunity to
10 respond to the other arguments that have been made. Very good.
11 So let me turn back to you counsel for defendant before I turn
12 to my next question, if there is anything you'd like to say in
13 response to counsel for plaintiff, either arguments, let me
14 give you the opportunity to do that so we don't miss that
15 opportunity. Go ahead.

16 MR. ROSS: First of all, your Honor, on how much it's
17 going to cost. Obviously that is something that's entirely
18 within their control within reason. And they're telling you
19 that they're going to have to spend 250 or 400 hours of lawyer
20 time to review documents that they already reviewed to find the
21 ones on these limited subjects. I'm a skeptic. I must say.
22 I'm not saying Mr. Hong is misrepresenting anything, but I'm a
23 skeptic, and I think the Court should be skeptical about how
24 big a burden is being claimed.

25 Second, it's easy to deal with that burden. You can

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1 shift it easily through my client by overproducing. If you
2 don't want to do the work to get through the documents, take
3 out the privilege documents and give us the rest. We'll look
4 through them and find the ones that are responsive. It will
5 shift the burden on us. It will be a document dump so to speak
6 as that phrase is used, but it's relatively modest in size, and
7 we'll speed through it so we can easily help them out if
8 they're going to find to be too burdensome to do what we think
9 the federal rules require them to do.

10 With respect to the effort that we made to limit the
11 document requests. At the start, I think I already offered it,
12 your Honor. A good faith effort to compromise but while
13 reserving rights is not a waiver of your right to take fuller
14 discovery. And, for example, if someone said the documents
15 that you're seeking are in these 20 file cabinets, and that's a
16 big burden to have to look through them. As a helpful counsel
17 saying, well, why don't you look through those five drawers and
18 see what you got.

19 And in this case when they look through the five draws
20 they found almost nothing that's responsive on certain topics.
21 And I didn't waive my right to seek the appropriate scope of
22 discovery to get what I need before I take depositions. And
23 now I'm saying, you need to look at the other filing cabinets,
24 whether they're electronic or hard copy. We also know that
25 they're very limited.

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1 I think it's reasonable. It's over the plate. They're
2 potentially responsive. And even if it is a \$100,000 burden in
3 a \$200 million case, some might say that's extremely
4 proportionate.

5 THE COURT: Thank you. Let me just drill into one of
6 your comments because I'm not sure I know the facts here. I
7 understand that there's some 8,000 documents that were
8 reviewed. Counsel for defendant your comments suggest that you
9 may believe that plaintiff have only produced documents that
10 are documents that were only produced as a result of the ESI
11 protocol. In other words, they may have not looked for paper
12 documents. Is that a concern here?

13 MR. ROSS: No, your Honor. That has not been the
14 basis for the request that we're talking about. The files may
15 well have been electronic and online, so personally I don't
16 know. Mr. Breland my colleague who's also on may know through
17 his discussions with plaintiffs' counsel what was encompassed
18 by their electronic searches. But our concern has not been, as
19 I understand it, that they didn't look at paper documents, so I
20 don't think that's at play.

21 THE COURT: Thank you. So counsel with respect to the
22 first request, this is for counsel for defendant, which is
23 request five related to the loan documents. You've described
24 some of the kinds of things that you're looking for through the
25 document production. Can I ask, are you anticipating taking a

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1 deposition from people involved in the negotiation of the
2 contracts? I ask in part to determine whether or not that
3 maybe a more efficient way of finding some of the information
4 related to the process of crafting these documents, as well as
5 the documents themselves as we evaluate the burden associated
6 with the request for paper documents. Counsel for defendant,
7 what's your expectation here.

8 MR. ROSS: David Ross, your Honor. The answer is, I
9 was not expecting to have to do so, and hoping not to have to
10 do so. The way that K&L Gates dealt with our subpoena was not
11 entirely satisfactory from our perspective, but we had not
12 brought it before your Honor. They delivered responsive
13 documents or potentially responsive documents to plaintiffs'
14 counsel rather than producing them to us as a non-party in
15 possession of relevant information. So my understanding is
16 that they sent 1200 or so documents that they thought were
17 responsive to the plaintiffs' counsel. And as I said, we got
18 less than 10 pieces of paper in total after 1200 documents were
19 sent by counsel.

20 THE COURT: Thank you. Let me come back to counsel
21 for plaintiff. Counsel, can I hear your response to
22 defendant's offer to accept a document dump. I assume, but
23 correct me if I'm wrong, that in reviewing the 8,000 documents
24 the first time around, your team coded those of the 8,000
25 documents that you thought were privileged. If that assumption

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1 is incorrect, let me know cause that's my assumption. I
2 understand that the burden associated with doing what Mr. Ross
3 just offered would not be substantial. How do you respond?

4 MR. HONG: My understanding is that with respect to
5 the coding would not have coded not responsive documents. I
6 think my understanding is that we coded the privilege documents
7 and not the responsive documents. If I am wrong about that,
8 since I did not do the review, my colleague Amber Will can tell
9 me otherwise who is also on the line. But my understanding is
10 that would not have coded not responsive as privileged. I do
11 want to address the burden issue which I think is critical
12 here, your Honor.

13 THE COURT: I'm sorry. Can we just pause and get an
14 answer to that question if somebody on the line knows it.

15 MS. WILL: Yes, your Honor. This is Amber Will for
16 plaintiff. And in the review I can confirm that documents were
17 marked for responsiveness first. And if they were marked
18 responsive to the limited request that were agreed upon by the
19 parties, then the documents would then be marked for
20 privileged. So if the document was marked not responsive in
21 the first instance, the privilege review would not have been
22 done. So it would require us to review all of the documents
23 that were originally marked non-responsive for a privilege
24 review the second time.

25 THE COURT: Good. Thank you. That's helpful. Thank

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1 you very much. I'm sorry, Mr. Hong, please go ahead.

2 MR. HONG: Mr. Hong again. I think one of the
3 critical issues is the burden, and this is whether it's a
4 reasonable burden or not. And since Mr. Ross uses the baseball
5 analogies, I would say that it's not right over the plate.
6 It's a wild pitch. And the reason why it's a wild pitch is
7 that -- first of all, my estimate is not something that I
8 pulled out of somewhere unknown. It's based on what we did in
9 the original review, how much time it required associates to do
10 the work at the average billing rate they are doing it. And
11 quite frankly, I did not estimate 200 hours to 400 hours. We
12 estimated a little lower than that quite frankly, but we still
13 came up with well over \$100,000 in our billing rate on that.

14 Whether it is \$100 million, \$200 million or a billion
15 dollars, it's still \$100,000, your Honor. It's still 100,000
16 plus. It's a substantial sum of money. So if you were to
17 compare millions versus thousands, well, perhaps Mr. Ross can
18 view it that way, but our clients do not necessarily view it
19 that way.

20 The second point that I wanted to make is about this
21 document dump that your Honor mentioned. We looked at these
22 documents very carefully for responsiveness, and some of them
23 are obviously not responsive, that's why we didn't produce it.
24 Some of them are confidential documents. So it's not that easy
25 for us to say, Oh, we just turn over whatever the non-privilege

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1 documents out of this collection on doing that. It takes
2 further review and further work, which is all arising to the
3 burden that we've been talking about. Given what their scope
4 is and given what the scope was, quite frankly, it is going to
5 cause a great deal of work at this point to do this, to
6 essentially redo this. What the central premise of this whole
7 request as we mentioned in our letter is that the defendants
8 spend a lot of time with us. We work together in trying to
9 come up with more limited but appropriate search terms.

10 We diligently and in good faith ran these searches and
11 did not come up with that many documents. Mr. Ross thinks that
12 they're documents in document folders somewhere and files that
13 we did not look at or we somehow did something surreptitious
14 about it. We didn't do that. That's what our hits were, and
15 they basically want us to do redo it. Because they're -- for
16 lack of a better word I think, the way I read it is they're
17 suspicious. There's nothing to be suspicious about. We did our
18 job, and those are the hits we had and those are the documents
19 we produced.

20 I also want to briefly address about the K&L Gates
21 documents. It is true that we produced relatively few
22 documents, but it is because they were related to the mezzanine
23 loans. Again, the responsiveness to the issues at hand is what
24 guided us to look at these documents. We weren't trying to
25 withhold something, again, in an unfair manner. So I guess

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1 what I wanted to just bear in mind is that we have produced in
2 good faith all the documents. We did not anticipate --
3 regardless of whatever Mr. Ross and others say about reserving
4 rights, we did not anticipate coming in April when the
5 documents were produced in January, we did not anticipate
6 coming three months later, basically a month and a half before
7 close of discovery to say -- to tell us, the plaintiff, to redo
8 document discovery and cause this substantial burden on us.
9 And that's the unreasonable part of this. That's the wild pitch
10 part of this whole request, your Honor.

11 THE COURT: Mr. Ross, can I ask you to respond to
12 that, understanding that during your conversation with counsel
13 for plaintiffs you reserved, did not waive rights I've heard
14 you say. Still, you just heard counsel for plaintiff argue in
15 essence that a decision was made about what the scope of
16 discovery should be here and that there's not good
17 justification to permit its expansion at this late stage. How
18 do you respond to that. And most significantly other than just
19 the number; in other words, the scant number of documents that
20 were produced as a result of this approach, what's the reason
21 why the broader scope of discovery requested here is now
22 warranted?

23 MR. ROSS: David Ross. Let me say three things. One,
24 as to the timing of our making the application to your Honor.
25 This falls into the famous, No good deed goes unpunished

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1 category in the sense that we have been trying to resolve these
2 complaints that we have had with the inadequacy of the
3 production for months. And perhaps it's our failing for having
4 tried to work on it to a point that we thought your Honor would
5 find it after looking at, for example, some of the attachments
6 to the document 90 that we filed. You can see how many back
7 and forth efforts we made to try to reach agreement with
8 plaintiffs' counsel to capture the documents on the subjects
9 that we're trying to get.

10 So perhaps a failing on our part for trying too hard
11 to reach agreement before coming to you, but that's the reason
12 why we are here now. Point two, it's not that late. Nothing
13 is imminent and it's not a problem. If it's going to take them
14 two weeks, so it takes them two weeks. In the scheme of this
15 case and in the scheme of the issues in this whole context,
16 that's nothing of great importance and there's no prejudice to
17 anybody.

18 Number three, there should have been responsive
19 documents on some of these topics. And we have from other
20 sources which we pointed out to them responsive documents that
21 they did not produce. Their failure to produce documents that
22 should have been searched for and obtained to us demonstrated
23 that they were not properly performing the searches that needed
24 to be performed. I'm not saying that anybody intentionally hid
25 anything or falsified anything. But in a case with the issues

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1 of importance here, we want to make sure that we have the
2 communications that Cushman and Wakefield had with tenants. I
3 don't think that that is so burdensome or difficult to find.
4 Same thing with --

5 THE COURT: I'm sorry. Can I pause you? Will you be
6 able to keep the thread if I interrupt you?

7 MR. ROSS: Yes.

8 THE COURT: Good. Just briefly, can you give me some
9 examples of the kind of things that you received from third
10 parties that you believe plaintiffs should have and that would
11 have been responsive that were not produced to you?

12 MR. ROSS: I'm going to ask Mr. Breland if he can
13 supply that, your Honor.

14 MR. BRELAND: This is Andrew Breland speaking for the
15 defendant. Your Honor, before we even began discovery in this
16 case, we were aware of efforts by the plaintiffs through
17 Rexmark Holdings to intervene in negotiations with prospective
18 or existing tenants at Union Station. We heard that from our
19 client, and our client heard that, from among other people, the
20 principal for the plaintiff. We're also aware of documentary
21 evidence, including email between plaintiff and our client
22 where the plaintiff attest that they are taking over
23 negotiations with tenants.

24 And finally we're aware of at least one marketing
25 document put together by Cushman & Wakefield for lease of

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1 office space at Union Station. None of those documents were
2 produced in plaintiff's January production, but they're
3 relevant and responsive to the request that we made.

4 THE COURT: Thank you. Did you share that information
5 with counsel for plaintiff to determine whether those came up
6 in the original group of 8,000 or so documents?

7 MR. BRELAND: Yes, your Honor. This is Andrew Breland
8 for the defendant. We specifically showed them the email or
9 one email between our client and plaintiffs principal that is
10 the relevant to the tenant interference issue. And the
11 response that we got -- and I'm not sure if it's reflected in
12 the attachment or if it's in one of the letters down the email
13 chain that was attachment D to our joint letter -- was that the
14 document wasn't responsive to the initially agreed upon
15 narrowed requests. We went back and forth on that issue, and
16 ultimately that's what gets us here is that they had a narrower
17 interpretation of our request than we did apparently.

18 THE COURT: Thank you. That's very helpful. I
19 apologize for the interruption, Mr. Ross, if you'd like to pick
20 up where you were.

21 MR. ROSS: Your Honor, we're close to an hour. I
22 think you understand our points. I think given the importance,
23 the size of the case, the significance of this discovery, to
24 our affirmative defenses and to plaintiffs' fundamental
25 arguments about what the contract says and means, these

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1 additional requests or the original requests and having them
2 responded to is appropriate, is reasonable, is proportional,
3 and we respectfully request that your Honor order them.

4 THE COURT: Very good. Understood. Counsel, what I'm
5 going to do is this. I unfortunately have some things that I
6 need to do. Go ahead, Mr. Hong.

7 MR. HONG: Your Honor, this is Mr. Hong. I would be
8 remiss if I didn't have Amber Will address the point that
9 Mr. Breland said for a minute or so if you may just indulge so
10 you have both sides of the story so to speak.

11 THE COURT: Yes, thank you. I'm happy to hear from
12 her.

13 MS. WILL: Thank you, your Honor. This is Amber Will
14 for plaintiff, and I'll keep it brief. I just want to note
15 that we did get an email from USSM regarding an email that they
16 believe should have been in the production. We identified by
17 email back to them that the email actually is not responsive
18 under the narrow document request that the parties had agreed
19 to back in December. I agree with Mr. Breland that this is
20 properly why they expanded their request to have that
21 "concerning" language rather than it be "with" language that
22 they started with and the parties had agreed to back in
23 December. But the document that they produced to us as
24 evidence that we did not engage thoroughly in our discovery
25 obligations was not actually responsive under the request that

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1 the parties had agreed upon.

2 THE COURT: Thank you. And counsel for defendant, let
3 me hear from you about that. I appreciate this may be the
4 genesis of the concerning formulation here. Can I hear your
5 response to that argument by counsel is -- in other words, were
6 plaintiffs in your view improperly construing in too narrow a
7 fashion your initial request; or were they construing your
8 initial request properly understanding that as formulated they
9 were more narrow than the requests that are being presented to
10 the Court now. It's pertinent to me as I'm thinking about what
11 the scope, if any, additional discovery I should permit here.
12 Counsel, can you just respond.

13 MR. ROSS: Go ahead, Andrew.

14 MR. BRELAND: Yes, your Honor. This is Andrew Breland
15 for defendant. The initial request that we've served back in
16 September of last year was documents and communications
17 reflecting efforts to communicate with prospective or existing
18 tenants. The email that we're talking about is absolutely
19 responsive to that initial request. As to the negotiated
20 initial request where we, as Mr. Ross said, reserved all
21 rights, we limited it to communications "with" tenants.

22 Now if the there had been any responsive documents in
23 the production to that issue which we raised both with the
24 Court and plaintiffs' counsel several times, we may not have
25 had an issue with it. The problem is, there were no responsive

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1 documents. So we engaged in the meet and confer process and
2 then tried to come up with a discovery request that would meet
3 the needs of the case while being narrower than the original
4 request that we served in September, and plaintiffs have not
5 sort of been willing to do anything beyond the initial request
6 that we got in December, but that were just that initial
7 narrowed request.

8 THE COURT: Thank you. So coming back to the language
9 of the initial request. We're talking about request 12. Is it
10 defendant's position that the document that you flagged and
11 that we've been discussing is a document or communication
12 reflecting efforts to communicate with and meet with existing
13 tenants at Union Station, such that would fall within the scope
14 of that initial request as drafted.

15 MR. BRELAND: Andrew Breland for defendant, your
16 Honor. Yes.

17 THE COURT: Thank you. Good. Understood. That's
18 helpful. So again, I apologize, counsel. What I'm going to do
19 is this. I'm going to schedule a brief conference, hopefully
20 brief conference on Monday. I need to do something now and I
21 can't keep my court reporter here what I'll call after hours on
22 a Friday, especially Good Friday. So I'm going to just take a
23 break now. I will schedule a conference on Monday morning
24 where I'll tell you what I think about this dispute and thank
25 you all for your time here today. I apologize that I can't

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1 take the time right now to deliver a decision, but I will get
2 you one early on Monday. Thank you all very much, counsel.
3 Have a good holiday weekend.

4 (Adjourned)